In the High Court of Judicature at Madras

Dated : 06.09.2006

C O R A M

The Honourable Mrs. Justice Prabha Sridevan

Writ Petition No.5315 of 1999

S. Sivagnanam Vaidyar,
Ravichandra Pharmacy,
Thickanan Code,
Kanyakumari District. .. Petitioner

Versus

1. The Government of Tamil Nadu,
   Rep. by its Secretary to Prohibition
   and Excise Department,
   Fort St. George, Chennai-9.

2. The Special Commissioner and
   Commissioner for Prohibition and Excise,
   Chepauk, Chennai-5.

3. The District Collector,
   Kanyakumari District at Nagercoil.

4. The Tahsildar (Excise),
   Kalkulam Taluk,
   Kanyakumari District. .. Respondents

Prayer : Petition filed under Article 226 of the Constitution of India to call for the records of the 2nd respondent herein relating to his order dated 9.9.1998 passed in Proceedings D.Dis.C/3134/97 confirming the order of the 3rd respondent dated 30.11.1996 in No.M4/Ni-NE/P1/83/ 1974-75 to 1980-81 and quash the said order by the issue of a writ of certiorarified mandamus directing the 3rd respondent to refund to the petitioner the sum of Rs.45,795/04 paid pursuant to the said order and forbearing respondents from levying or demanding or collecting any excise duty including the duty of Rs.6,278/- levied by the 4th respondent on 30.11.1998 on the petitioner's unrestricted preparations prepared as per Sahasvayogam, a recognised Pharmacopeia under Rule 65 of the Medicinal and Toilet Preparations (Excise Duty) Rules, 1956.

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For Petitioner : Mr. M. Kalyana Sundaram, Senior Counsel for Mr. G. Sethuraman

For Respondent : Mr. B.K. Girish Neelakantan, Government Advocate.

O R D E R

The petitioner manufactures ayurvedic preparations and claims to be a hereditary Vaidyar. He had earier prepared Dasamoolarishtam, Abhayarishtam, Amritharishtam and Kalyanakudam. Now, he is preparing Kanakasavam and Jeerakarishtam. He claims that they are all 'unrestricted preparations' and are not found in the list of 'restricted preparations' given in the Schedule to the Medicinal and Toilet Preparations Rules (Rules in short). In Kanyakumari District, from which the petitioner hails, the ayurvedic preparations are mainly unrestricted preparations since manufacture of restricted preparations involves expenditure. Restricted preparations are mainly manufactured by big pharmaceutical companies and the process involves distillation or addition of alcohol. The unrestricted preparations of the petitioner are manufactured using medicinal plant parts such as leaves, stems, seeds, fruits, roots, nuts, etc. and by adding water and by keeping the mixture under fermentation for a period of 45 days, periodically adding medicines to them. The preparations that are brought about by a process of fermentation without boiling are called Asavas and the preparations that are brought about by boiling and keeping under fermentation are called Arishtas. No alcohol is added nor are they brought about by the process of distillation. The manufacture of each of the preparations is as per the formulae and directions given in the Pharmacopoeia Sagasrayogam, a Malayalam Ayurvedha Pharmacopoeia which has been in vogue from time immemorial in the State of Kerala and Kanyakumari District and it is a recognised pharmacopoeia within the meaning of Rule 65 of the Rules. The unrestricted preparations of the petitioner and others contain only self-generated alcohol. The respondents found that these preparations contained self-generated alcohol in excess of 2% and consequently, excise duty was demanded under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (hereinafter referred to as the Act). The petitioner preferred an appeal. The appeal was dismissed. The dismissal of the appeal was challenged before the Board of Revenue. There also, he was not succesful. The further appeals to the Government were also dismissed by orders dated 13.8.1982. The Government held that the Ayurvedic preparations manufactured by the petitioner contain pure spirit in excess of 2% and these are capable of being consumed as ordinary alcohol beverages and therefore, attract liability to pay duty irrespective of the fact whether these specific ayurvedic preparations have been included in the Schedule as restricted preparations or not. Against that, writ petitions were filed. These writ petitions were finally disposed of on 30.3.1990 and the matter was remitted to the Government for disposal afresh, after affording a reasonable opportunity to the petitioner. The

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appeal was rejected. As against that, the present writ petition has been filed.

2. The following provisions of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 are relevant and they are extracted hereunder :

"2. Definitions. - (c) 'Dutiable goods' means the medicinal and toilet preparations specified in the Schedule as being subject to the duties of excise levied under this Act."

"(g) 'Medicinal preparation' includes all drugs which are a remedy or prescription prepared for internal or external use of human beings or animals and all substances intended to be used for or in the treatment, mitigation or prevention of disease in human being or animals."

"(k) 'Toilet preparation' means any preparation which is intended for use in the toilet of the human body or in performing apparel of any description, or any substance intended to cleanse, improve or alter the complexion, skin, hair or teeth and includes deoderants and perfumes."

"3. Duties of excise to be levied and collected on certain goods. - (1) There shall be levied duties of excise, at the rates specified in the Schedule on all dutiable goods manufactured in India."

'The Schedule'
(See Section 3)

Item No.	Description of dutiable goods	Rate of duty
(2)	Medicinal preparations in Ayurvedic, Unani or other indigenous systems of medicine –	
	(i) Medicinal preparations containing self-generated alcohol which are not capable of being consumed as ordinary alcoholic beverages.	Nil

"(xix) 'Restricted preparation' means every medicinal preparation specified in the Schedule and includes every preparation declared by the Central Government as restricted preparation under these rules."

"(xx) 'Unrestricted preparation' means any medicinal preparation containing alcohol but other than a restricted preparation or a spuriour preparation."

Section-C
Classification of Medicinal Preparations containing Alcohol

"64. Asavas and Aristas are the principal types of Ayurvedic preparations in which alocholic content is self generated and not added as such.

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65. Until a standard Ayurvedic pharmacopoeia has been evolved by the Central Government, the pharmacopoeias that are in vogue in the various States shall be recognised as standard Ayurvedic pharmacopoeias.

66. No duty shall be levied on Ayurvedic preparations containing self-generated alcohol in which the percentage of pure alcohol by volume does not exceed 1.2 units. Where the percentage of pure alcohol by volume exceeds 1.2 units, the duty shall be leviable under is in excess of per cent, duty will be leviable under item 2(i) or 2(ii) of the Schedule to the Act according as the preparations are capable of being consumed as alcoholic beverage or not."

Ayurvedic Preparations

Drakaharishta
Drakshasva
Pippalyasavam

(The other ayurvedic preparations mentioned in the Schedule are with reference to the Company which manufactures them and therefore, they are not listed here for the purpose of this case).

3. The relevant provisions of the Tamil Nadu Spirituous Preparations (Control) Rules, 1984 are extracted hereunder :

"3. Definitions :- (i) 'Medicinal preparation' includes all drugs (except medicated wines) containing alcohol or any intoxicating drug, which are a remedy or prescription prepared for internal or external use of human beings or animals and all substances intended to be used for, or in the treatment, metigation prevention of diseases in humen beings or animals under any of the different systems of medicine namely, Allopathic, Homoeopathic, Ayurvedic, Siddha or any other Indian system of medicine.

(j) 'Restricted preparation' means spirituous preparations that are intended for internal consumption and containing more than 18% v/v of alcohol and medicinal preparations containing intoxicating drugs :

Provided that all ayurvedic preparations containing self-generated alcohol and classified as 'restricted preparations' under the Medicinal and Toilet Preparations (Excise Duties) Rules, 1959 shall be treated as restricted preparations for the purpose of these rules."

"(l) 'Spurious preparation' means any medicinal or toilet preparation containing alcohol or intoxicating drug which –

.....

(ii) In the case of those claiming to be patent or proprietory preparations, does not conform to the formula approved by the Government of Tamil Nadu."

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4. The manufacturers of Ayurvedic medicinal preparations, claiming that they are unrestricted preparations, have filed several writ petitions before this Court. All of them have been dealt with in the judgment of the First Bench of this Court dated 21.7.2006 in Writ Appeal Nos.631 to 633 of 2005 etc. batch [Gomatha Ayurvedic Pharmacy vs. Director of Drug Control & Others]. The relevant paragraphs of the above judgment are extracted hereunder :

"In the first round in Writ Petition No.1852 of 1982 and other connected writ petitions, decided on 04.11.1988, a learned single Judge of this Court repelled the contention of the petitioners that the Tamil Nadu Prohibition Act cannot deal with the medicinal and toilet preparations which comes within the meaning of the Medicinal and Toilet Preparations (Excise Duties) Act and the Rules. The learned single Judge upheld the validity of G.O.Ms.No.3031 issued by the State Government. It was held that the Tamil Nadu Spirituous Preparations (Control) Rules, 1984 which had replaced G.O.Ms.No.3031 contain similar provisions and for the same reason validity of the Rules was upheld. The said decision was confirmed in W.A.No.1508 and 1445 of 1988 disposed of on 17.04.1989. Ultimately, the matter went to the Supreme Court and the Supreme Court in the decision in KANYAKUMARI DISTRICT SIDDHA AND AYURVEDA VAIDYAR SANGAM & ANOTHER VS. GOVERNMENT OF TAMIL NADU & OTHERS, {1996 (8) SCC 342} upheld the decision of the High Court.

Undaunted by the decision of this Court, which was confirmed by the Supreme Court, fresh writ petitions were filed. W.P.No.7999 of 1996 was filed on behalf of KANYAKUMARI DISTRICT SIDDHA AND AYURVEDA VAIDYAR SANGAM for issuing a writ of declaration declaring that licenses in S.P.XI (for wholesale) and S.P.XIV (for retail) read with Clause II of the Tamil Nadu Spirituous Preparations (Control) Rules, 1984 intended to govern restricted spirituous preparations cannot apply or govern unrestricted spirituous preparations and to pass orders directing the authorities to forbear from requiring the manufacturers/dealers in unrestricted spirituous licenses from taking out licenses in Form S.P.XI and S.P.XIV. The aforesaid writ petition was dismissed by the learned single Judge. Ultimately in W.A.No.360 of 1998 decided on 19.03.1998 it was observed by the Division Bench as follows :

'On appreciation of evidence, the authorities will determine whether the substance on which the licence is being imposed or restriction is being imposed fall within the definition of a restricted preparation or it is not covered by the definition of a restricted preparation.

....

The appellant or the aggrieved person will be at liberty to challenge on a question of fact before the appropriate authority that the restriction imposed is on an unrestricted

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preparation and satisfy the authority, who will, on appreciation of facts and evidence come to the conclusion that the restriction is on an unrestricted preparation. So far as Rule 11 is concerned, the vires of which have already been upheld or provides for the licence of the wholesale and retail licence for restricted and unrestricted, which is the sole privilege of the State grants the privilege of the sake of liquor in favour of the individual. We find no reason to come to a contrary conclusion as the vires of the rules have been upheld by the Supreme Court, thereby confirming that the licence is required for the restricted as well as the unrestricted preparations. In view of the observations made above, we confirm the finding of the learned single judge and find no ground to interfere in this appeal. The writ appeal is dismissed'.

In the mean time, several other writ petitions had been filed for issuance of writ of mandamus forbearing the respondents from enforcing the provisions of the Tamil Nadu Spirituous Preparations (Control) Rules, 1984 and also in any manner interfering with the manufacture of unrestricted ayurvedic medicinal preparations under the licence issued by the authorities. The contention in those writ petitions was to the effect that the persons who had taken necessary licence under the Drugs and Cosmetics Act, 1940 were not required to take further licence under Rule 11 of the Tamil Nadu Spirituous Preparations (Control) Rules, 1984. The Division Bench of this Court in W.P.No.1211 of 1995 and batch disposed of on 28.02.2001, negatived the contention that the rules framed by the State Legislature were repugnant to the Central enactment. It was further observed that the Central enactment such as the Drugs and Cosmetics Act or Medicinal and Toilet Preparations (Excise Duties) Act or the Rules framed under such Act would govern the preparation of the medicines. It was further observed that when the medicinal preparation contains self-generated alcohol, it would also fall within the meaning of liquor as defined under Section 3(9) of the Tamil Nadu Prohibition Act and so long as preparations contain alcohol, whether self-generated or not, licence as envisaged under Rule 11 of the Tamil Nadu Spirituous Preparations (Control) Rules, 1984 has to be obtained.

In the light of the aforesaid decisions the learned single Judge has rejected the contention of all the petitioners that they have absolute right to manufacture ayurvedic preparations and no control can be exercised by the authorities under the Prohibition Act and disposed of the petitions with the certain directions."

The writ appeals were dismissed, confirming the order of the learned single Judge. These passages are extracted only to show that the question whether an Ayurvedic preparation is "restricted" or "unrestricted" is a question of fact.

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5. According to the learned senior counsel appearing for the petitioner, when the charging Section refers to the Schedule under the Act, it is not open to the respondents to rely on the Schedule to the Rules to levy excise duty. In any event, even in the Schedule to the Rules, the drugs prepared by the petitioner are not included and therefore, no duty can be levied on ayurvedic preparations containing self-generated alcohol. Learned senior counsel submitted that the respondents cannot levy duty on the preparations manufactured by the petitioner on the ground that he obtained the licence only after 1.4.1957. According to him, when these drugs have been in vogue for centuries as per the indigenuous pharmacopoeia known as Sahasrayogam, the question whether the petitioner obtained a licence after 1.4.1957 is hardly material. It was also submitted that Item 2(i) under the Schedule to the Act provides for imposition of Nil duty on 'medicinal preparations containing self-generated alcohol which are not capable of being consumed as ordinary alcoholic beverages'.

6. The learned Government Advocate would submit that the question whether the preparation is being manufactured after 1.4.1957 is question of fact, as also the question whether it is capable of being consumed as alcoholic beverage. Therefore, when a decision has been taken on facts against the petitioner, in writ jurisdiction, there cannot be any interference.

7. In A.I.R. 1963 S.C. 622 [M.B.S. Oushadhalaya vs. Union of India], the question raised was whether the State Governments were entitled to tax three ayurvedic preparations, subject matter of the proceedings, under the various Excise Acts in force in the respective States. Before the Constitution came into force, all these three preparations were liable to provincial excise duty under Item 40 of List II of the VII Schedule to the Government of India Act, 1935. The Constitution made a change in the three legislative lists. Now, under Item 84 of List I, the Union has the power to impose duties of excise on tobacco and other goods manufactured or produced in India except (i) alcoholic liquors for human consumption, and (ii) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance like opium etc. Thus, the Constitution took away the power of the States to impose duties of excise on medicinal and toilet preparations containing alcohol or any substance like opium etc. and gave that power to the Union. But, in view of Article 277, the State Governments continued to levy excise duties on these preparations till the year 1957. In the year 1955, the Parliament made the Medicinal and Toilet Preparations Excise Duty Act, which was brought into force from April 1, 1957. The Schedule to the Act prescribes the duty, and for all medicinal preparations which are not capable of being used as ordinary alcoholic beverages, nil duty is payable. The Central Government framed rules and the administration of the Act and the Rules was entrusted to the State Government. A list of medicinal preparations which were

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capable of being used as ordinary alcoholic beverages was also published along with the Rules, and Rule 65 provides that until a standard ayurvedic pharmacopoeia has been evolved by the Central Government, the pharmacopoeias that are in vogue in variuos States shall be recognised as standard ayurvedic pharmacopoeias. The Supreme Court observed as follows:

> "The main question therefore that falls for consideration in these cases is whether the three preparations are in fact medicinal preparations containing alcohol falling within Item 84, List 1 of the Seventh Schedule to the Constitution on which item the Act is based and so whether they are medicinal preparations as defined in Section 2(g) of the Act. If they are medicinal preparations as defined therein they will be governed by the Act, and the omission of these preparations from the list appended to the Rules will not make any difference to their being medicinal preparations within the meaning of the Act."
>
> "On a consideration of the material that has been placed before us, therefore, the only conclusion to which we can come is that these preparations are medicinal preparations according to the standard Ayurvedic text books referred to already though they are also capable of being used as ordinary alcoholic beverages. They will therefore clearly fall within the definition of 'medicinal preparation' and would be liable to duty under Item 1 of the Schedule of the Act. So far as the decision of the Standing Committee is concerned which resulted in the omission of these three preparations from the list attached to the Rules, that is not conclusive on the question whether these are medical preparations or not. Further, the fact that these preparations are omitted from the list attached to the Rules would make no difference to their being medicinal preparations within the meaning of the Act, liable to duty under Item 1 of the Schedule, if they are in fact medicinal preparations as we hold them to be. They will therefore be liable to duty under Item 1 of the Schedule to the Act as they undoubtedly fall under that item and are capable of being consumed as ordinary alcoholic beverages."

8. The ayurvedic system of medicine follows the formula in standard books which are available in the different regions of our country. The basis may be different in Northern India, but as far as the State of Kerala and Kanyakumari District is concerned, the formula is based on Sahasrayogam. According to the petitioner, these have been taken from extracts from authoritative ayurvedic treatises and have been in vogue for centuries. The words, "all other medicinal preparations being manufactured from a date prior to 1st April, 1957 in Rule 61 cannot be construed as manufactured specifically by the petitioner." They can only mean that medicinal preparations which have been in vogue and which have been manufactured from a date prior to 1st April, 1957 shall be considered to be not capable of being misused as ordinary alcoholic beverages.

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9. Rule 60(1) of the Rules is relevant and is extracted hereunder :

> "Rule 60.(1) A list of Medicinal preparations which are considered as capable for being misused as ordinary alcoholic beverages, hereinafter referred to as restricted preparations, is given in the Schedule. All other medicinal preparations being manufactured from a date prior to 1st April, 1957 shall be considered to be not capable of being misused as ordinary alcoholic beverages (hereinafter referred to as unrestricted preparations)."

This is made clear by Rule 60(3) which reads as follows :

> "Medicinal preparations other than official allopathic preparations which are manufactured in India for the first time on and subsequent to 1st April, 1957 shall be presumed to be restricted preparations."

Therefore, it is hardly relevant that the petitioner started manufacturing the drugs after 1st April, 1957. The question is whether they have been manufactured even prior to 1957. The view taken in the impugned order appears to be incorrect. Only preparations containing self-generated alcohol which is capable of being consumed as ordinary alcoholic beverage, attract excise duty. The list of such restricted preparations is found in the Schedule to the Rules.

10. Admittedly, none of the aforesaid preparations manufactured by the petitioner is included in the Schedule to the Rules. In the order passed in W.P. Nos.7958 and 7959 of 1982 [V. Ponniah Vaidyar & Another vs. Government of Tamil Nadu & Others - dated 30.3.1999], by which the matter was remitted back to the Government, it was held that Rule 60(1) was not attracted. The relevant passages in the above order are extracted below :

> "It was found that these preparations contained self-generated alcohol in excess of 2%".
>
> .....
>
> "The Government held that the Ayurvedic preparation manufactured by the petitioners contained proof spirit in excess of 2% and these preparations are capable of being consumed as ordinary alcoholic beverages and would, therefore, attract liability to pay duty irrespective of the fact whether these specific Ayurvedic preparations have been included in the Schedule as restricted preparations or not. Reliance was also placed on the decision of the Supreme Court in A.M.B.S. Oushadalaya Dacca (Private) Limited vs. Union of India [A.I.R. 1963 S.C. 622]."
>
> .....

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"It is not in dispute that only restricted preparations, namely preparations containing self-generated alcohol which are capable of being consumed as ordinary alcoholic beverage attract excise duty. The list of such restricted preparations is found in the Schedule to the Rules. It is an admitted case that none of the aforesaid preparations manufactured by the petitioners are included in the Schedule to the Rules. Therefore, Rule 60 (1) is not attracted."

.....

"The matter is remitted to the Government to restore the proceedings which culminated in G.O. Ms. No.613 and 612, Prohibition & Excise Department dated 13.8.1982 and dispose of them afresh after affording a reasonable opportunity to the petitioners."

This is exactly contrary to the law laid down by the Supreme Court in M.B.S. Oushadhalaya's case (supra). The Government has held that the ayurvedic preparations manufactured by the petitioners contained proof spirit in excess of 2% and these preparations are capable of being consumed as ordinary alcoholic beverages and would, therefore, attract the liability to pay duty irrespective of the fact whether these specific alcoholic preparation have been included in the Schedule as restricted preparations or not. This is exactly what was held in M.B.S. Oushadhalaya's case (supra).

11. The learned Judge remitted the matter afresh for consideration. It is clear that the order passed in the writ petition was contrary to the judgment of the Supreme Court. In fact, though this judgment was relied on, it has not been referred to. When it applies squarely to this case, we cannot look beyond it. In (2005) 1 S.C.C. 608 [Sunita Devi vs. State of Bihar & Another], the Supreme Court observed as follows :

"'Incuria' literally means 'carelessness'. In practice, per incuriam is taken to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law', as held in Young vs. Bristol Aeroplane Co. Ltd. [(1994) 2 All E.R. 293] is avoided and ignored if it is rendered 'in ignoratium of a statute or other binding authority'. Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. The above position was highlighted in State of U.P. vs. Synthetics and Chemicals Ltd. [(1991) 4 S.C.C. 139]. To perpetuate an error is no heroism. To rectify it is the compulsion of the judicial conscience."

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12. In the result, the writ petition is disposed of as follows, the matter is sent back to the first respondent, only to enable the petitioner to advance his case that the finding that his preparations are capable of being consumed as alcoholic beverages is not correct. If it is found that they are, then the preparations are liable to excise duty; but if they are not, then no duty can be imposed. The inclusion or exclusion of the product in the Rules is immaterial. No costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Secretary to Prohibition
   The Government of Tamil Nadu,
   and Excise Department,
   Fort St. George, Chennai-9.

2. The Special Commissioner and
   Commissioner for Prohibition and Excise,
   Chepauk, Chennai-5.

3. The District Collector,
   Kanyakumari District at Nagercoil.

4. The Tahsildar (Excise),
   Kalkulam Taluk,
   Kanyakumari District.

1 cc To The Government Pleader, SR.41091.

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